

DOCKET FILE COPY ORIGINAL
RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

94-107

In the Matter of)
)
Petition on Behalf of the Louisiana)
Public Service Commission for Authority)
to Retain Existing Jurisdiction Over)
Commercial Mobile Radio Services)
Offered Within the State of Louisiana)

PR File No. 94-SP5

To: The Commission

COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

Mobile Telecommunication Technologies Corp. ("Mtel")^{1/}, by its attorneys, respectfully submits its comments in opposition to the above referenced Petition filed by the Louisiana Public Service Commission ("LPSC") requesting authority to continue existing jurisdiction over the rates charged, services rendered, and the setting of other terms and conditions for CMRS offered within the State of Louisiana.^{2/} Mtel submits that the LPSC has without

^{1/} Mtel and its subsidiaries, SkyTel Corp. ("SkyTel") and Destineer Corp. ("Destineer") are Commission licensees providing a wide range of commercial mobile radio services ("CMRS"). SkyTel Corp. holds a common carrier nationwide paging license and numerous common carrier non-network paging licenses and provides paging services on both a local and nationwide level. Destineer Corp. was awarded a Pioneer's Preference to operate an advanced Nationwide Wireless Network in the narrowband Personal Communication Service ("PCS") and was successful in obtaining two other nationwide narrowband PCS spectrum allotments at the recent auction. Destineer plans to offer its service on a local and nationwide level as well. Accordingly, Mtel is well positioned to provide the Commission with informed comment in this proceeding.

^{2/} Pursuant to the Public Notice, Report No. DA 94-876 (August 12, 1994), comments and replies to the Petition are due within 30 days of the date of public notice of the petition in the
(continued...)

question failed to meet the burden of proof required to extend rate regulation to that portion of CMRS comprising of paging services and narrowband PCS and accordingly, the LPSC petition must be denied with respect to those CMRS services. In support, the following is shown:

**I. THE ACT AND THE COMMISSION'S RULES
SPECIFY THOSE LIMITED INSTANCES IN WHICH
A STATE MAY SUCCESSFULLY PETITION FOR
AUTHORITY TO CONTINUE REGULATION AND
WHAT SHOWING MUST BE MADE IN SUCH PETITIONS**

The Omnibus Budget Reconciliation Act of 1993 prohibits states from regulating the entry into business or the rates of any CMRS or private mobile radio service.^{3/} The preemption of state entry and rate regulation became effective on August 10, 1994; however, pursuant to Section 20.13 of the Commission's rules and Section 332(c)(3)(B) of the Communications Act adopted in the Regulatory Parity proceeding^{4/} any state that had rate regulations in effect as of June 1, 1993 that are applicable to a service that exists on that date, could up until August 10, 1994, petition the FCC for authority to continue regulation over such CMRS rates.

^{2/}(...continued)

Federal Register, which was August 18, 1994 (See 59 Fed. Reg. 42595). Accordingly, these Comments are timely filed.

^{3/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

^{4/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31, 9 FCC Rcd 1411, 1501-1507, 1521-1523 (1994).

The FCC may grant these petitions to extend or initiate CMRS rate regulation only if a state demonstrates that: (1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (2) such market conditions exist and such service is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such state.^{5/}

With respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust or unreasonable rates, the Commission has stated that the states must submit evidence to justify their showings.^{6/} First, Sections 20.13(b)(1) and 20.13(a)(4) of the Commission's rules require that petitions describe in detail the rules the state proposes to establish if the petition is granted. In addition, Section 20.13(a)(2) of the Commission's rules sets forth a list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and the need for consumer protection. Examples of this evidence include the following:

^{5/} See 47 USC §332(c)(3)(A) and §20.13(a)(1) of the Commission's Rules.

^{6/} Pursuant to Section 332(c)(3), any state filing a petition shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates.

- a. The number of CMRS providers in the state, the types of services offered by CMRS providers in the state, and the period of time that these providers have offered service in the state;
- b. The number of customers of each CMRS provider in the state, trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data are unavailable, and annual revenues and rates of return for each CMRS provider;
- c. Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data are unavailable;
- d. An assessment of the extent to which services offered by CMRS providers the state proposes to regulate can be substituted for services offered by other carriers in the state;
- e. Opportunities for new providers to enter into the provision of competing services and an analysis of any barriers to such entry;
- f. Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anticompetitive or discriminatory practices or behavior by CMRS providers in the state;
- g. Evidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust and unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates that demonstrates the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative; and
- h. Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other

information about complaint filed with the state regulatory commission.^{7/}

**II. THE STATE PETITION FAILED TO MEET
THE COMMISSION'S SUBSTANTIAL
BURDEN OF PROOF FOR CONTINUATION
OF RATE AND ENTRY REGULATION**

The LPSC filed a petition requesting authority for the State of Louisiana to continue exercising authority over the rates charged, services rendered, and the setting of other terms and conditions of mobile radio services. The LPSC has exercised its regulatory authority over CMRS providers by (1) requiring companies to register to operate in the state; (2) addressing customer complaints; (3) remedying discriminatory rates; (4) setting and/or approving interconnection rates; (5) regulating rates; (6) monitoring rates; (7) remedying unlawful and/or unwarranted practices; and (8) reviewing proposed mergers.^{8/} The LPSC states that in order effectively to protect Louisiana consumers and at the same time foster competition in the Louisiana CMRS market, the LPSC must retain the ability to exercise its authority to act in all of the ways listed above until such time as the CMRS market functions in a truly competitive manner.^{9/}

^{7/} 47 C.F.R. § 20.13(a)(2).

^{8/} La. R.S. 45:1500 et seq. provides for the regulation of Radio Common Carriers generally and La R.S. 45:1502 provides for rate regulation of Radio Common Carriers specifically. The LPSC's petition seeks the continuation of this rate regulation.

^{9/} See LPSC Petition at Page 7.

In support of its petition, the LPSC provides a detailed analysis of the lack of competition in Louisiana resulting from the cellular duopoly as a basis for its continued rate regulation. Louisiana provides examples of what it calls excessive and anti-competitive rates; however, every example involves only cellular rates.^{10/} Louisiana does not provide any evidence which substantiates the need for rate regulation for any CMRS other than cellular.^{11/}

The showing provided by the LPSC simply cannot suffice to support an extension of rate regulation over paging and narrowband PCS. See, e.g., the Commission's Second Report and Order in GN Docket No. 93-252, at 1467, where, in the context of exercising forbearance authority, the Commission determined not to treat CMRS as a single market and, instead, to review each CMRS on a service-by-service basis. At the very least, the LPSC should have presented a bona fide study indicating how paging rates may be unreasonable and how there may be a lack of competition in the provision of paging services. The LPSC presents no explanation why this was not done. In the absence of such a showing, it would be

^{10/} The LPSC states that it has received many complaints about excessive cellular charges. See LPSC Petition at page 10. The LPSC states that the rates charged by CMRS providers in Louisiana may be excessive, suggesting that the market is operating as a duopoly with identical rates and market allocation, and harming consumers. See LPSC Petition at page 33.

^{11/} Indeed, the LPSC uses the term "CMRS" interchangeably with "cellular."

contrary to the public interest to continue rate regulation of these services.

In view of the above, there can be no doubt but that the LPSC has failed to meet the burden of proof required to meet the "market conditions" standard for paging and narrowband PCS. Thus, even if the Commission were to grant the LPSC petition, paging and narrowband PCS services must be exempted from any rate and entry regulation due to the LPSC's failure to submit any reasonable evidence which would support its market conditions showing for these services.

**III. PAGING AND NARROWBAND PCS ARE HIGHLY
COMPETITIVE SERVICES FOR WHICH
THERE IS NO BASIS FOR THE
CONTINUED RATE OR ENTRY REGULATION**

Both the Act and the Commission's rules expressly limit continued state rate or entry regulation to a restricted group of CMRS: those where market conditions fail to protect subscribers adequately from unjust practices or unreasonable discrimination, or where such market conditions exist and the service at issue is a substitute for landline telephone service in a substantial portion of the market. In the case of paging and narrowband CMRS, neither of these conditions exists, and there is thus no basis for continued regulation.

The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to permit the Commission to forbear from tariff regulation of CMRS, and the LPSC

has not attempted to rebut that finding.^{12/} Indeed, in view of the LPSC's determination not to include any evidence with respect to paging or narrowband PCS, it must be inferred that the LPSC also believes that paging and narrowband PCS services are competitive. So the LPSC view would appear to be wholly consistent with that of all other states, since no state has presented any argument that such services are not competitive.

The paging industry is already highly competitive, as evidenced both by the high number of providers and the low rates for services available today. Competition for paging services in CMRS is increasing even more, due to the addition of private paging carriers that have recently been authorized to have exclusive use of their frequencies. The very recent allocation of spectrum for narrowband PCS is expected to heighten competition for existing paging companies, as well as to assure a competitive PCS marketplace from the inception of service.^{13/}

^{12/} See e.g., Second Report and order in GN Docket No. 93-252, 9 FCC Rcd 1411, 1468 (1994), where the Commission reported that, on average, paging companies face five other competitors.

^{13/} In the narrowband PCS context, the Commission created 26 narrowband PCS licenses (eleven nationwide, six regional, seven MTA-based and two local BTA-based licenses). Already competition is gearing up in narrowband PCS since at least six established CMRS providers will receive nationwide narrowband PCS licenses. See Public Notice of August 17, 1994, Report No. PCS-NB-94-1, announcing that the nationwide narrowband applications of Paging Network of Virginia, KDM Messaging Company, Destineer, Airtouch Paging, Bell South Wireless, and Pagemart II, Inc. had been accepted for filing.

IV. CONCLUSION

The Petition purports to provide evidence which substantiates the need for continued rate regulation for all CMRS and meets the Commission's burden of proof threshold. However, the LPSC chose only to provide evidence for one component of CMRS and that evidence only attacked the cellular duopoly structure. More importantly, the petition was completely devoid of any argument or evidence pertaining to paging and narrowband PCS. This, in Mtel's view, is fatal to the state's request for extension of state rate regulation for CMRS and in particular paging and narrowband PCS services. The Commission placed a formidable burden of proof on the states in keeping with the Congressional intent to preempt state rate and entry regulation. In this instance, the state simply failed to meet its burden. Accordingly, Mtel urges the Commission to deny the instant Petition and exempt paging and narrowband PCS from any state rate and entry regulation.

For all of the above reasons, Mtel urges the Commission not to grant the subject petition.

Respectfully submitted,

**MOBILE TELECOMMUNICATION
TECHNOLOGIES CORP.**

By: 

Thomas Gutierrez
J. Justin McClure

Its Attorneys

Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.,
Suite 1200
Washington, D.C. 20036
(202) 857-3500

September 19, 1993

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 19th day of September, 1994, sent by first class U.S. mail copies of the foregoing "COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORP." to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

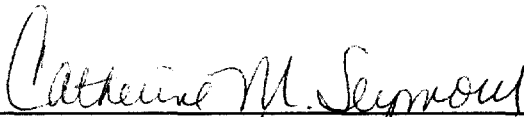
Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

David Furth, Acting Chief
Rules Branch
Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

Brian A. Eddington, General Counsel
Carolyn L. DeVitis, Senior Attorney
Louisiana Public Service Commission
One American Place, Suite 1630
Baton Rouge, LA 70825

Paul L. Zimmering
William L. Geary, Jr.
Stephanie D. Shuler
Special Counsel to the Louisiana
Public Service Commission
546 Carondelet Street
New Orleans, LA 70130


Catherine M. Seymour